JD–105–98
Cleveland, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALCON FABRICATORS,
A DIVISION OF ALCON INDUSTRIES

and Case 8-CA-26240

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW, AND ITS LOCAL 217

SUPPLEMENTAL DECISION AND ORDER ON REMAND

More than three years ago, on March 27, 1995, I issued a Decision and Order in this proceeding. On July 15, 1995, the Board adopted that Decision and Order, with minor modifications of the Order. On May 6, 1997, a panel of the United States Court of Appeals for the Sixth Circuit, as urged by the Respondent, reversed the Board's Decision and Order, but remanded the case to the Board for further findings.

I had concluded that, even if I were to credit the three witnesses presented by the Respondent to support its claim of an appropriate basis for its February 22, 1994, withdrawal of recognition from the Union, their testimony was, as a matter of law, insufficient to make such withdrawal legally appropriate.

In remanding, the Court held that the Board (and the undersigned) had failed to give "adequate consideration of the totality of the foregoing facts as they relate to the reasonableness of Alcon's good-faith doubt defense" and that proper consideration was precluded, in the first instance, by my failure to make credibility determinations. On April 9, 1998, the Board remanded the proceeding to Chief Administrative Law Judge Robert A. Giannasi, for the purpose of designating an administrative law judge to prepare a supplemental decision "setting forth the resolution of credibility issues, findings of fact, conclusions of law, and recommendations, including a recommended order."[1]

On April 22, 1998, Chief Judge Giannasi issued an order notifying the parties and the amicus curiae (the AFL-CIO) that he was appointing the undersigned, who had retired on January 3, 1997, to preside over the remand as a rehired annuitant, and that any submissions

[1] The Board also denied a motion filed by the Respondent on March 9, 1998, arguing against the need for a remand in view of the Supreme Court's decision in Allentown Mack Sales and Service, Inc. v. NLRB, _ U.S._, 118 S. Ct. 818, 157 LRRM 2557 (Jan. 26, 1998). The Board stated that in view of the remand being ordered, it was "more appropriate for the Respondent to raise its legal argument to the judge for his consideration." On April 23, 1998, the Respondent filed a motion for reconsideration, which the Board denied on May 28.

should be filed within thirty days. Briefs were received from the General Counsel and the Respondent in timely fashion.

In Allentown Mack, *supra*, the Supreme Court considered at length the basic legal issue presented by this case: the standard that the Board must apply in determining the propriety of an employer's withdrawal of recognition from a union premised upon an asserted belief that the union no longer represents a majority of the employees in the bargaining unit. The Court accepted the rule, usually applied by the Board, that in order to rebut a presumption of continuing union majority status, an employer must prove , by a "preponderance of the evidence," that it harbored a good-faith doubt, based on objective considerations, that the union no longer enjoyed the support of a majority of the bargaining unit employees.[2]

For present purposes, one of the most significant conclusions reached by the Court was that, in applying the reasonable doubt rule, the word "doubt" should be understood to mean "uncertainty" about a union's majority status rather than a "disbelief" that the majority had been maintained.

Of similar import was the Court's corollary holding that the Board, in assaying whether an employer had achieved the requisite state of "uncertainty," must seriously consider even unspecific testimony by a manager that an employee had stated that other employees were opposed to union representation. Thus, a manager testified that a night-shift employee had told him that "the entire night shift did not want the union." Bloch, the employee, did not testify, and the record was silent as to his basis for making such an assertion. The Board disregarded the testimony. The Court held that "absent some reason for the employer to know that Bloch had no basis for his information, or that Bloch was lying, reason demands that the statement be given considerable weight." 118 S. Ct. at p. 824.

While it would seem that Allentown Mack will have the effect of affording employers greater latitude for disrupting labor-management relationships, the Court's opinion does not alter the requirement that it is the employer who must shoulder the burden of going forward and demonstrating by a preponderance of the evidence that it entertained the necessary legal doubt of majority. In the present case, Respondent sought to meet that burden by presenting three witnesses. In my original decision, I saw no need to make express credibility determinations about their testimony, in view of my opinion that even if they were to be believed, their evidence would be insufficient to carry the day for the Respondent.[3] Now I must directly resolve the question of credibility.

In my earlier decision, I pointed out deficiencies I had discerned in the testimony of Respondent's witnesses, and I incorporate that discussion here. In re-reading the transcript of proceedings, it still seems obvious that some of the testimony raises serious suspicion—one example is Montemagno's attribution of a remarkably similar statement to two different employees at two different times; another is Martin's apparently illogical testimony that

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[2] While Allentown Mack involved the question of the factual prerequisite necessary to conducting a lawful poll of employees for purposes of evaluating majority status, the Court recognized that the same standard of good-faith reasonable doubt applied to both polling and withdrawal of recognition issues.

[3] The Sixth Circuit inadvertently refers to "the ALJ's conclusion that five employees…continued to disdain representation." At no point did I reach such a "conclusion," a fact which the Court of Appeals subsequently recognized by remanding this case for "credibility determinations which the ALJ failed to make…."

employee Raymond had turned against the Union and, at the same time, was angry at employee Errington, who circulated the decertification petition, for causing union-related "division" in the shop. However, after deliberation, I find it difficult to conclude that some suspicious testimony is a sufficient basis for discrediting everything said by a witness, especially when none of the testimony is contradicted.[4]

This becomes particularly important , after Allentown Mack, in the case of the testimony given by Montemagno. He testified that two employees told him that a majority of the workers did not favor the union (Raymond: "if there was a vote, that the union would be out of there"; Farkas: "if anybody had a chance to vote on it again that the union would be gone."). This is pretty thin stuff, totally lacking in detail or provenance, but it is precisely the kind of statement that, in Allentown Mack, the Supreme Court said was entitled to "considerable weight" if credited.

In deciding to credit Martin, Montemagno, and Mullins, I have taken into account not only the problems with their testimony which analysis of the record makes apparent, but also secondary factors which might be said to have a bearing on the veracity of the case presented by Respondent. Such factors include Respondent's failure to mention any doubt of majority in its letter withdrawing recognition, which plainly assumes an absolute right to do so after the passage of one year following certification; Respondent's failure to offer the notes referred to by Mullins or to at least explain why they were not offered, which tactics might ordinarily be expected from trial counsel in such a situation; and the failure to produce as a witness Respondent's president, who made the "executive decision" to rescind recognition. Having considered all elements which might weigh against the credibility of the three witnesses, I have nonetheless concluded that I should accept their uncontroverted testimony.[5]

I thus find, as I hypothesized in my initial decision, that five out of the fourteen or fifteen unit employees had indicated, within a few months of the February 22 withdrawal of recognition, that they no longer wished to be represented by the Union. I further find that two employees told plant manager Montemagno in the same time period their belief that the Union did not represent a majority of the employees. I also find that this information was conveyed to the president of Respondent, and I perceive no tenable ground for concluding that the decision to withdraw recognition was not reached in good faith.

Finally, taking into account as well other circumstances such as the "narrow election victory in 1992" to which the Court of Appeals adverted, I conclude that, in the words of the Court, "the totality of the…facts" adequately sustains a finding that, to borrow from the Allentown opinion, Respondent "had reasonable, good-faith grounds to doubt—to be uncertain about—the union's retention of majority support." 118 S. Ct. at p. 825, emphasis in original. I shall therefore recommend that the charge and the complaint be dismissed.

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[4] In my first decision, I noted that testimony may be discredited even if not contradicted, citing NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49 (9th Cir. 1970). In the present case, I believe that the evidence which would support the application of that doctrine is, all things considered, wanting.

[5] Demeanor plays no role in this conclusion, although it seems probable that if any of them seemed to be clearly lying three years ago, I might well remember my impression to that effect.

CONCLUSIONS OF LAW

1. The Respondent, Alcon Fabricators, a Division of Alcon Industries, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace & Agricultural Implement Workers, UAW, and its Local 217, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact, conclusions of law, and the entire record in this proceeding, I issue the following recommended:[6]

SUPPLEMENTAL ORDER

IT IS HEREBY ORDERED that the charge and the complaint in Case 8-CA-26240 be, and it hereby is, dismissed.

Dated, Washington, D.C. June 25, 1998

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Bernard Ries
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Supplemental Decision and Order On Remand shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.